No. 92-1

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

LYNWOOD MOREAU, *et al.*,
Petitioners,
v.
JOHNNY KLEVENHAGEN, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONERS

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QUESTION PRESENTED

Section 7(o) of the Fair Labor Standards Act, as amended, defines the circumstances under which a public employer is permitted to deviate from the basic rule that employees required by their employer to work overtime must be paid in cash at a rate of time and a half. Under § 7(o), a public employer may provide compensatory time in lieu of overtime pay in cash *only* pursuant to

> (i) applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) in the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work. [29 U.S.C. § 207(o)(2)(A).]

The question presented here is whether a public employer in a state which does not provide for formal collective bargaining, who refuses to respond to or to work out a compensatory time agreement with a representative designated by its employees for that purpose, may nonetheless unilaterally formulate and impose a compensatory time agreement on its employees?

PARTIES TO THE PROCEEDING BELOW

I.

PLAINTIFFS/APPELLANTS/PETITIONERS

Lynwood Moreau individually and as president of the Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, and as FLSA REPRESENTATIVE of 37 similarly situated, consenting Harris County Law Enforcement Officers.

The Harris County Deputy Sheriff's Union, Local 154 IUPA, AFL-CIO, on its own behalf, and as an FLSA representative of the 400 Deputy Sheriffs it represented at the initiation of this litigation, and its 1670 current Deputy Sheriffs members.

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Mark A. Walker
Walter L. Walker
Roger D. Wedgeworth
Calvin Gary Wilson
Terry Allen Wooten

II.

DEFENDANTS/APPELLEES/RESPONDENTS

Johnny Klevenhagen, Sheriff of Harris County, Texas.

Judge Jon Lindsay, Harris County Commissioner, Harris County, Texas.

Harris County, Texas.

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 956 F.2d 516 (5th Cir. 1992) and is reproduced as Appendix A (pp. 1a-14a) in the separately bound Appendix to the Petition for a Writ of Certiorari ("Pet. App.") in this case.

The District Court's memorandum and order denying plaintiffs' motion for partial summary judgment and granting defendants' motion for summary judgment, dated August 29, 1990, is unreported and is reproduced as Appendix B in the Appendix to the Petition. (Pet. App. 15a-24a). The District Court's final judgment dated August 29, 1990 is unpublished and is reproduced as Appendix C in the Appendix to the Petition (Pet. App. 25a).

JURISDICTIONAL STATEMENT

The Court of Appeals' opinion and judgment were entered on March 31, 1992. The Petition for a Writ of Certiorari was filed on June 29, 1992, and this Court granted that Petition on October 5, 1992. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND REGULATIONS

Section 7(o) of the Fair Labor Standards Act, 29 U.S.C. § 207(o), is reproduced in Appendix E of the Appendix to the Petition (Pet. App. 28a-29a).

The Secretary of Labor's regulations set out at 29 C.F.R. § 553.23, are reproduced in Appendix E of the Appendix to the Petition (Pet. App. 30a-35a).

STATEMENT OF THE CASE

1. Section 7(a) of the Fair Labor Standards Act, as amended, establishes a general rule that employers must pay their employees one and one half times the employees' normal pay for overtime work. 29 U.S.C. § 207(a). FLSA § 7(o), added to the Act in 1985, however, establishes a limited exception to this general rule with respect to *public employers*: such employers may, under certain stated circumstances, provide "compensatory time"—*viz.*, paid time off—in lieu of the overtime pay that the Act normally requires. 29 U.S.C. § 207(o).

In the regard most pertinent here, § 7(o)(2)(A)(i) states that compensatory time may be provided in lieu of the normally required overtime pay when authorized by the "applicable provisions of a collective bargaining agreement, memorandum of understanding or any other agreement between the public agency and representatives of such employees; . . ." The statute also specifies that this is the *only* way in which a public employer may utilize compensatory time for those employees who are "covered by" § 7(o)(2)(A)(i). 29 U.S.C. § 207(o)(2).

2. Petitioners in this case are all deputy sheriffs in Harris County, Texas, employed by the Harris County Sheriff's Department and the Sheriff of Harris County, Johnny Klevenhagen. Seeking to utilize the option presented by FLSA § 7(o)(2)(A)(i), the 113 petitioners designated the Harris County Deputy Sheriffs Union, Local 154 and/or Eugene T. Merritt, Jr. or Lynwood Moreau—each an officer of Local 154[1]—as their representatives for the purpose of reaching an FLSA compensatory time agreement with their public employer. Harris County was formally notified of this designation on July 8, 1986. Local 154 has represented deputy sheriffs in Harris County for more than ten years in a variety of capacities, including representation in grievance proceedings, civil service hearings, worker compensation proceedings, budget proceedings, in proceedings before the Harris County Board and the Sheriff, and in the deputies' day-to-day problems and controversies concerning working conditions. Local 154 had also previously reached an agreement with the County which provides for the deduction of union dues from the payroll of those deputy sheriffs wishing to have union dues deducted.

Despite this designation of FLSA representation, Harris County neither sought a compensatory time agreement under FLSA § 7(o)(2)(A)(i) nor provided the deputy sheriffs with overtime pay. Instead, while refusing to treat with the petitioners' representatives, Harris County affirmed and reenacted the portion of its prior pay system concerning compensatory time. *See* Harris County Personnel Regulations, Overtime Compensation for Non-Exempt Employees, Sections 7.01 and 7.02 (effective Dec. 7, 1985).[2]

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[1] On April 15, 1988, when the suit was originally brought, Eugene T. Merritt, Jr. was president of the union. Later, Lynwood Moreau became president of the union.

[2] Various controversies regarding the prior compensatory time rules generated petitioners efforts to obtain a compensatory time agreement under FLSA § 7(o)(2)(A)(i). Specifically, petitioners

All of these Harris County provisions concerning the use of compensatory time had been imposed unilaterally by the County as a condition of employment. All employees hired after April 15, 1986, as part of the "checking in process," are required to sign the County Auditor's new hire payroll compensation forms, which contain a boiler plate provision stating that the signature of the employee evidences that he or she had read, understood, and accepted the terms and conditions of employment, as recited on the form and in the Harris County personnel regulations. See ¶ 13 to Defendants' Statement of Facts, Joint Appendix ("Jt. App.") at 28.

3. Because Harris County has continued to use its unilaterally adopted compensatory time system while refusing to enter into any dicussions or agreements with Local 154 or any other representative designated by the deputies concerning overtime compensation, petitioners instituted this suit in the United States District Court for Southern District of Texas on April 15, 1988. Petitioners' Complaint challenged the legality of the County's requirement that deputy sheriffs accept compensatory time off in lieu of overtime pay despite their designation of a representative and despite the absence of any agreement with that representative.

The district court and the United States Court of Appeals for the Fifth Circuit below upheld the Harris County program and dismissed petitioners' claims. In doing so, these courts purported to follow prior cases of the Fourth and Eleventh Circuits interpreting FLSA § 7(o)(2)(A), and to reject cases on the same subject in the Ninth and Tenth Circuits.

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sought a clear rule concerning when compensatory time could be used, preserved, or cashed out, and how they would gain access to compensatory time. In these ways, petitioners sought—through an agreement under FLSA § 7(o)(2)(A)(i)—to protect the value of the compensatory time option offered by the FLSA.

Based on the conflicts among the circuits that the interpretation of FLSA § 7(o)(2)(A) has generated, petitioners filed a petition for *certiorari* in this Court. On October 5, 1992, this Court granted that petition.[3]

SUMMARY OF ARGUMENT

1. This case involves the proper interpretation of FLSA § 7(o)(2)(A), which sets out the means by which public employers may bring themselves within a special exception to the general FLSA policy of requiring overtime pay for all overtime hours worked (and, accordingly, of prohibiting the use of compensatory time arrangements as an alternative). *See* 29 U.S.C. § 207(a).

Petitioners—as employees who have designated a representative to negotiate an agreement with their employer on the issue of compensatory time, as provided in § 7(o)(2)(A)(i)—contend that they fall within that provision's coverage. Petitioner's position is that their employer may therefore only use compensatory time in lieu of overtime pay pursuant to some form of agreement or understanding with petitioners' representatives.

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[3] As discussed in the Petition for Certiorari, five United States courts of appeals have decided cases in which public employees, in states where public employees have no collective bargaining rights under state law, have claimed that their employers violated the FLSA by adopting compensatory time programs without reaching agreements under § 7(o)(2)(A)(i) with the employees' designated representatives. The Ninth and Tenth Circuits, following somewhat different rationales, have sustained these employee claims. *See Nevada Highway Patrol Ass'n v. Nevada*, 899 F.2d 1549 (9th Cir. 1990); *Local 2203 v. West Adams Co. Fire District*, 877 F.2d 814 (10th Cir. 1989). In addition to the court below, the Fourth and Eleventh Circuits have rejected such claims, again adopting various distinct rationales. *See Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992) (en banc); *id.* at 1396 (Luttig, J., concurring); *Dillard v. Harris*, 885 F.2d 1549 (11th Cir. 1989), *cert. denied*, 111 S.Ct. 210 (1990); *cf. Abbott v. City of Virginia Beach*, 879 F.2d 132 (4th Cir. 1989), *cert. denied*, 493 U.S. 1051 (1990). *But see Wilson, supra*, 964 F.2d at 1400 (Ervin, J., dissenting) (5 members of court urging that court follow reasoning of Tenth Circuit in *Local 2203* case).

Respondents, in contrast, argue that § 7(o)(2)(A)(i) applies only where the employer chooses to enter some type of agreement wih its employees' representatives. According to respondents, a public employer has the option of refusing to enter such an agreement and, instead, of imposing its preferred compensatory time program under § 7(o)(2)(A)(ii) as a condition of employment.

2. As we will show, while the statutory language is not perfectly clear, the authoritative regulations of the Department of Labor clearly support petitioners' position and reject respondents' position. There are, however, particularly compelling reasons for recognizing the Department of Labor regulations at issue here as authoritative.

First, those contemporaneous regulations were promulgated at the specific direction of Congress, which mandated that the Labor Department—which had been intimately involved in the legislative deliberations—use its rulemaking authority to implement the particular statutory provisions at issue here. *See* pp. 12-14, *infra*.

Second, the Labor Department's interpretation of this statutory provision is fully supported by one of the major documents from the relevant legislative history, the Report of the House Committee on Education and Labor, H. Rep. 99-331, 99th Cong. 1st Sess. (1985), which commented on the precise language now at issue. *See* pp. 14-15, *infra*.

Third, the Labor Department's regulation is fully consistent with the overall policy approach to the issue of compensatory time that animated the 1985 legislative deliberations that produced the Amendments Act. Those deliberations reflected a consensus that compensatory time should be available in public employment when offered under terms that would be mutually agreeable to the parties concerned. Congress, in contrast, did not embrace the proposition that, where employees designate a representative, public employers should nevertheless be able to unilaterally impose their own chosen terms regarding compensatory time. *See* pp. 15-18, *infra*.

Finally, the rulemaking process assured that the regulations represent the contemporaneous, carefully considered, and fully-informed judgment of the Secretary, made with full benefit of the views of all concerned parties. *See* pp. 18-19, *infra*.

3. Three lines of argument have been advanced in support of respondents' challenge to the Department of Labor's interpretation of this statute. None of these lines of argument has merit.

First, respondents argue that their interpretation is supported by the plain meaning of the statute. This argument ignores the statutory language's open texture and results in a reading that denies the statutory provision all meaning and effect. *See* pp. 20-21, *infra*. Moreover, respondents' proffered interpretation of the statute is entirely incompatible with the legislative history. *See* p. 22, *infra*.

Second, respondents assert that Congress intended FLSA § 7(o)(2)(A)(i) not to apply in states—such as Texas—where formal collective bargaining in the public sector is prohibited by state law. This assertion, however, adds a requirement nowhere to be found in the statute, reads language out of the statutory text, and ignores the background against which Congress acted. *See* pp. 23-27, *infra*.

Third, in a variant of the same argument, respondents assert that Texas law prohibits any binding contracts between public employers and their employees' labor unions, and that this fact should render FLSA § 7(o)(2)(A)(i) inapplicable. Once again, this argument misconceives the statutory and relevant administrative materails. The relevant statutory provision simply does not bind any public employer to any agreement establishing enforceable obligations of the kind established by the law of contracts. Rather, the provision opens a limited option to public employers, which the employers may exercise if they choose, and then renounce at any time. *See* pp. 27-32, *infra*.

ARGUMENT

A. The Relevant Statutory and Administrative Provisions and Their Background

1. Under § 7(a) of the Fair Labor Standards Act, as amended, 29 U.S.C. § 207(a) ("FLSA" or "the Act"), employers must generally pay all covered employees for all overtime hours worked "at a rate not less than one and one-half times [their] regular rate." The issue in this case concerns the scope of an *exception* to this general rule created for public employers by FLSA § 7(o)(2)(A), of the Act, which was added to the Act as part of the Fair Labor Standards Amendments Act of 1985 ("Amendments Act"), P.L. 99-150; 99 Stat. 790 (1985).

In relevant part, § 7(o)(2)(A) provides as follows:

> (2) A public agency may provide compensatory time [in lieu of overtime] only—
>
> (A) pursuant to—
>
> (i) Applicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees; or
>
> (ii) In the case of employees not covered by subclause (i), an agreement or understanding arrived at between the employer and employee before the performance of the work; . . .
>
> * * * *
>
> In the case of employees described in clause (A)(ii) hired prior to April 15, 1986, the regular practice in effect on April 15, 1986, with respect to compensatory time off for such employees in lieu of the receipt of overtime compensation, shall constitute an agreement or understanding under such clause (A)(ii). [29 U.S.C. § 207(o)(2)(A) (*reprinted* at Pet. App. 29a).][4]

It is petitioners' contention in this case that, under subclause (i) of this provision, if the employees of a public employer designate a representative to negotiate with their employer regarding a compensatory time agreement, thereafter their employer may only provide compensatory time in lieu of overtime pursuant to a mutually acceptable compensatory time agreement. To put this another way, the public employer, in such a circumstance, must either conform to the normal overtime pay requirements imposed by the statute on employers generally, or reach and abide by the terms of a subclause (i) agreement.

In contrast, respondents contend that their program of providing compensatory time in lieu of overtime pay is validated by subclause (ii) of § 7(o)(2)(A), even though respondents' employees designated a representative to seek a compensatory time agreement with respondents, and respondents refused to entertain any such agreement. This is so, respondents have argued, because subclause (ii) permits a public employer to pro-

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[4] Other provisions of FLSA § 7(o) establish minimum standards that all compensatory time agreements by public agencies must meet to comply with the Act. For example, under § 7(o)(1), all compensatory time agreements must provide "time off [to employees] at a rate not less than one and one-half hours for each hour of [overtime] employment"; under § 7(o)(3)(A), compensatory time agreements may only be provided to employees for a statutorily specified maximum of overtime hours worked, with any further overtime work being compensated in overtime pay; under § 7(o)(4), compensatory time agreements must provide that employees will receive payment at no less than certain specified rates for any compensatory time unused upon their termination; under § 7(o)(5), employees must have the right to use their compensatory time off within a "reasonable period" after requesting use of that time; and, under § 7(o)(6)(B), employees must receive full regular compensation during any compensatory time off taken. *See* 29 U.S.C. § 207(o).

vide compensatory time either pursuant to the terms of an agreement between the employer and the individual employee (with the employer able to make acceptance of such terms a condition of employment) or—for those hired before April 15, 1986—pursuant to the employer's regular prior practice. 29 U.S.C. § 7(o)(2)(A)(ii). Subclause (ii) of FLSA § 7(o)(2)(A) limits the class that it governs to "employees *not* covered by subclause (i)."

2. As the foregoing review of the basic statutory material shows, the controversy here arises because subclause (i), which is cross referenced in subclause (ii), does not demarcate any particular class of employees. Rather, that subclause provides that, within its province, compensatory time may be provided only pursuant to

> [a]pplicable provisions of a collective bargaining agreement, memorandum of understanding, or any other agreement between the public agency and representatives of such employees. . . . [29 U.S.C. § 207(o)(2)(a)(i).]

Thus, exactly which classes of employees are "covered by subclause (i)" and which are "not covered" is not explicitly stated in the statutory text. As the Tenth Circuit explained, "it is unclear whether [the phrase "employees not covered by subclause (i)"] means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative." *Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-17 (10th Cir. 1989). Given this ambiguity, and given Congress' action in charging the Department of Labor with the authority to administer the FLSA, the proper starting point in clarifying the meaning of § 7(o)(2)(A) is the Department's interpretation of that provision.

3. In enacting the Amendments Act, Congress specifically provided that "[t]he Secretary of Labor shall . . . promulgate such regulations as may be required to implement" the provisions of the Amendments Act. P.L. 99-150, § 6, 99 Stat. 790 (1985). Pursuant to this command, the Secretary of Labor, after full notice and comment

procedures, issued regulations which specifically address the issue posed here.

The Department of Labor's regulations make two interpretative points clear:

First, the employees "covered by subclause (i)"—and thus excluded from subclause (ii)—are employees who "have a representative." 29 C.F.R. § 553.23(b)(1) (*reprinted* at Pet. App. 30a). And, these employees remain "covered by subclause (i)"—and thus excluded from subclause (ii)—regardless of whether an agreement between their employer and their representative has been successfully concluded. *Id.* In this regard as the regulations state:

> Where employees have a representative, the agreement or understanding concerning the use of the compensatory time must be between the representative and the public agency either through a collective bargaining agreement or through a memorandum of understanding or other type of oral or written agreement. [*Id.*]

And, the regulations add that subclause (ii) governs only in circumstances "[w]here employees of a public agency do not have a recognized or otherwise designated representative." 29 C.F.R. § 553.23(c)(1).

Second, the regulations go on to make explicit that employees shall be deemed to "have a representative"—and thus be "covered by subclause (i)"—once the employees designate a representative; no formal arrangement or recognition by the employer is necessary:

> In the absence of a collective bargaining agreement applicable to the employees, the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees. [29 C.F.R. § 553.23(b)(1) (*reprinted* at Pet. App. 31a).]

Therefore, these regulations make it clear beyond a doubt that respondents, once their employees have des-

ignated a representative to negotiate a compensatory time agreement under FLSA § 7(o)(2)(A)(i), are required either to pay their employees overtime pay under the FLSA's normal rules or to reach and abide by a compensatory time agreement with that representative. An employer cannot, as respondents have done, impose its chosen compensatory time policy on those of its employees who have designated a representative by treating its policy as individual agreements that have been made conditions of employment for those employees.

3. The law of this Court is clear, of course, that in cases such as this, an administrative agency's contemporaneous construction of a statute that it has been charged with interpreting and enforcing is entitled to a heavy presumption of correctness. *See, e.g., Chevron U.S.A. v. Natural Res. Def. Council*, 467 U.S. 837 (1984); *Aluminum Company of America v. Central Lincoln Util. Dist.*, 467 U.S. 380, 389-90 (1984); *Udall v. Tallman*, 381 U.S. 1, 16 (1965); *Boutell v. Walling*, 327 U.S. 462, 470-72 (1945); *Norwegian Nitrogen Prod. Co. v. United States*, 288 U.S. 294, 315 (1933) (Cordozo, J.); *National Lead Co. v. United States*, 252 U.S. 140, 145 (1920).

Moreover, for a number of reasons, the administrative regulations in this case have a particularly strong claim to judicial deference.

First, in contrast to the usual situation, the Secretary of Labor's regulations were not issued pursuant to a general rulemaking authority but rather were promulgated pursuant to an express congressional command: *viz.*, section 6 of the Amendments Act specifically instructs "[t]he Secretary of Labor . . . [to] promulgate such regulations as may be required" for implementing the FLSA Amendments Act of 1985. P.L. 99-150, § 6; 99 Stat. 790.[5]

[5] The Secretary is, of course, the official with overall responsibility for FLSA enforcement. Under the FLSA, the Secretary is given explicit authority to "supervise the payment of unpaid . . . overtime compensation owing to any employee," and to bring civil suits to enforce § 7's overtime compensation provisions. 29 U.S.C. § 216(c). *See also* 29 U.S.C. § 217. Although employees may bring independent actions without relying on the Secretary—as petitioners have brought an independent action here—the right to bring such an action terminates if the Secretary chooses to file suit. 29 U.S.C. § 216(b). The Secretary also has the statutorily mandated duty of annually reporting to Congress regarding developments under the FLSA and the proposing of amendments to the FLSA. 29 U.S.C. § 204(d).

In this way, Congress *clearly* expressed special confidence and trust in the Secretary's ability to properly elaborate this statute.

In large part this congressional action stems from the extraordinary role that the Secretary of Labor played in the legislative process that generated the Amendments Act.

The FLSA Amendments Act of 1985 was Congress' effort to adapt the FLSA to the particular concerns of public employers and employees after this Court's decision in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985).[6] The Secretary's role began almost immediately after *Garcia*, when the Secretary endorsed efforts to amend the FLSA and testified regarding those proposed amendments before one of the relevant congressional committees. In addition, the Secretary—who was responsible for enforcing *Garcia*—had, in consultation with congressional leaders, agreed to delay the enforcement of *Garcia* pending formulation and passage of the Amendments Act. Indeed, throughout consideration of

[6] In *Garcia v. San Antonio Metropolitan Transit Authority*, this Court upheld the constitutionality of Congress' earlier applications of the FLSA to public employers. The 1974 Congress applied the FLSA to virtually all public employment, making no special exceptions analogous to § 7(o) regarding the application of § 7(a)'s broad overtime pay guarantee. *See* 88 Stat. 58, 60 (1974); *see also* 80 Stat. 831 (1966). But this legislative decision had in large part been declared unconstitutional in *National League of Cities v. Usery*, 426 U.S. 833 (1976), and the FLSA public employee coverage provision lay dormant until this Court's *Garcia* decision.

the Amendments Act, the Secretary monitored developments to determine whether, in light of legislative progress, continued delay in the enforcement of *Garcia* was a justifiable policy. At the time of the legislation's final passage—nine months after *Garcia*—the Secretary's critical and sensitive role was widely noted.[7]

Second, the Labor Department's interpretation of § 7(o) is fully supported by one of the major documents from the Amendments Act's legislative history, the Report of the Subcommittee on Labor Standards of the House Committee on Education and Labor, H. Rep. 99-331, 99th Cong. 1st Sess. (1985). Indeed, the regulation, in essence, represents the Secretary's acceptance of this Report as the authoritative explanation of § 7(o). The House Report—which accompanied H.R. 3530, the House version of the Amendments Act—extensively commented on the language that would become § 7(o). And, the Report made quite clear that coverage of an employee under § 7(o)(2)(A)(i) does not depend on *the existence of an agreement with the employees' designated representative*, but on *the designation of a representative by the employees*:

> The use of compensatory time in lieu of cash must be pursuant to some form of agreement or understanding between the employer and the employee, or notice to the employee, prior to the performance of work. Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent as long as it is a representative designated by the employees, the agreement or understanding must be between the representative and the employer, either through collective bargaining or through a memorandum of understanding or other type of agreement. Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee.
>
> * * * * *
>
> In the case of employees who have no representative and were employed prior to April 15, 1986, an employer that has had a regular practice of awarding compensatory time in lieu of overtime pay shall be deemed to have reached an agreement or understanding . . . as of April 15, 1986. [H. Rep. 99-331, *supra* at 20.]

Third, the Labor Department's regulation is fully consistent with the overall policy approach to the issue of compensatory time that animated the 1985 legislative deliberations over the Amendments Act. Initially, many public employers and their organizations responded to *Garcia* by requesting that Congress entirely repeal the application of the FLSA's overtime provisions to public employees. The first formal legislative proposal, Senator Nickles' S. 1570, which was introduced in its original form on August 1, 1985, would have exempted public employers from all overtime provisions of the FLSA. *See* Senate Hearings at 1-2 (Sen. Nickles). The Secretary of Labor began by supporting this proposal. *See id.*, at 503-504 (Sec. Brock). But efforts to enact S. 1570 in this form were doomed by the adamant opposition of public employee labor organizations and their allies.[8]

[7] *See Hearings Before the Subcommittee on Labor of the Senate Committee on Labor and Human Resources, Fair Labor Standards Amendments of 1985*, 99th Cong., 1st Sess. (1985) ("Senate Hearings") at 502-21 (Secretary Brock); 131 Cong. Rec. H9238 (October 28, 1985) (Rep. Jeffords) (noting assistance of Secretary of Brock and his staff during legislative consideration of Amendments Act); *id.* at H9240 (Rep. Jones) (same); *id.* at H9241 (Rep. Murphy) (same); *id.* at H9917 (Rep. Jeffords) (noting Department of Labor support for final bill); H. Rep. 99-331, 99th Cong. 1st Sess. 11-16 (1985) (correspondence between Chairman of House Subcommittee on Labor Standards and Department of Labor).

[8] Large numbers of public-employee labor organizations mobilized to oppose S.1570 and other efforts to remove public employees from meaningful FLSA coverage. The Executive Director of the AFL-CIO's Public Employee Department summarized the views of myriad labor organizations in a statement at the Senate Hearings: "Our position . . . is a very simple one: we're pleased to be covered by the law; we should have been covered all along, and at this time

To avoid legislative deadlock—and, indeed, to reach an expeditious legislative solution—Congress proceeded along a route that emphasized compromise between public employers and public employee representatives.

As the means to the desired end, public employer groups met with public employee representatives and hammered out a draft bill which set the stage for the final legislative negotiations. *See, e.g.*, 131 Cong. Rec. S14047 (Sen. Nickles) (the final Senate bill "is different from the bill I originally introduced and represents a compromise among the affected parties"); 131 Cong. Rec. H9916 (Rep. Hawkins) ("bipartisan efforts" and "compromise" produced Amendments Act). The compromise bill was supported by "the U.S. Conference of Mayors, the National League of Cities, the National Conference of State Legislators, the AFL-CIO, and the Fraternal Order of Police." 131 Cong. Rec. S14047 (Sen. Nickles): *accord* 131 Cong. Rec. H9238 (Rep. Hawkins). With such broad

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we seek no changes in the law." Senate Hearings at 157 (testimony of A. Bilik). For other statements by representatives of the many public-employee unions who testified in congressional hearings in opposition to S.1570, as initially drafted, see the following: Senate Hearings, at 164-185 (International Association of Fire Fighters ("IAFF")); *id.*, at 186-201 (Service Employees International Union ("SEIU"); *id.*, at 375-377 (Professional Fire Fighters of Oklahoma); *id.*, at 377-379 (Oklahoma Fraternal Order of Police); *id.*, at 561-562, 568-569, 574-576 (National Association of Police Organizaitons); *id.*, at 562-567 (Fraternal Order of Police); *id.*, at 569-571 (National Troopers Coalition); *Hearing on the Fair Labor Standards Act Before the Subcomm. on Labor Standards of the House Comm. on Education and Labor*, 99th Cong., 1st Sess. (1985) ("House Hearings"), at 85-108 (American Federation of State, County and Municipal Employees); *id.*, at 109-128 (IAFF); *id.*, at 129-140 (SEIU); *id.*, at 151-154 (Amalgamated Transit Union); *id.*, at 155-164 (International Union of Police Association); *id.*, at 179-180 (IAFF); *id.*, at 236-240 (American Federation of Teachers).

support, the compromise bill was quickly passed by Congress.[9]

The Secretary of Labor's understanding of FLSA § 7(o)(2)(A) draws its essence from the bilateral negotiation process between public employer and public employee representatives that led to the drafting and enactment of the provision. Compensatory time agreements, under the Secretary's view of the statute, will govern where there is a negotiated agreement with the employee's designated representative. Such negotiated solutions are a practical guarantee that the terms of the compensatory time arrangement take into account the interests of both the employer and the employees. Absent such agreement there is of course no such assurance.[10] By the same token,

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[9] As we have briefly mentioned, the Secretary of Labor adopted an FLSA enforcement policy, that, in effect, had created pressure on those seeking legislation to compromise. *See* pp. 13-14, *supra*. In particular, the Secretary agreed at the outset not to attempt to enforce the FLSA against public employers whose coverage was triggered by *Garcia* for six months after the date of the *Garcia* mandate, April 15, 1985. The Secretary also agreed not to seek back wages for that six month period. But, the Secretary did make clear: (1) that private litigation could be initiated at any time regardless of the Secretary's enforcement policy; (2) that such litigation could involve substantial claims against public agencies; and (3) that at the end of six months the Department would have no choice but to begin comprehensive enforcement actions. *See* Senate Hearings at 502-521. Although during Congress' deliberations the Secretary granted congressional leaders extensions of his six-month enforcement deadline, *see* 131 Cong. Rec. H9241, the prospect of backpay liability for public agencies mounting, while the legislative process continued, forced the proponents of legislation to seek compromises in order to obtain quick legislation.

[10] Public employers and public employee representatives agreed in their testimony before Congress that use of compensatory time in lieu of overtime pay, if pursuant to equitable arrangements, could be mutually beneficial. *See, e.g., House Hearings*, 99th Cong., 1st Sess. 155 (1985) (G. Brazgel, IUPA Reg. Dir.) ("Comp time is

under the Secretary's view, the statute's facilitation of compensatory time agreements remains a major special benefit for public employers. The general overtime policy of the FLSA, after all—seeking as it does to protect employees from potentially unfair arrangements and to encourage the broad distribution of work—makes compensatory time agreements entirely unlawful in the private sector. *See* FLSA § 7(a).

Finally, the history of the Department of Labor's rulemaking that generated the rule in question demonstrates that this rule represents the carefully considered and fully-informed judgment of the Secretary, made soon after the legislation was enacted.

Immediately after enactment of the legislation, the Department of Labor commenced the rulemaking process that generated the comprehensive Amendments Act rules, which include the rule here at issue. The Secretary began with a series of meetings with representatives of all interested parties, including public employers and public-employee organizations, to discuss the issuance of proposed regulations. *See* 51 Fed. Reg. 13402 (April 18, 1986) (describing process). Then, before the Amendments Act's effective date, the Secretary issued a set of proposed regulations—including a proposed interpretation of § 7(o)(2)(A), which was substantially the same as the final rule—"to guide State and local government employers and employees in applying the 1985 Amendments." *Id.* at 13404. After full notice and comment procedures—in which the Secretary received extensive comments from public employers, public employee organizations, and congressional leaders prominent in the statute's passage—the final rule was issued, 52 Fed. Reg.

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vital to policing. Not only is it an important benefit to on the job police officers, but it also is an important tool of sound police management.")

2012 (January 16, 1987), accompanied by full discussion of the comments received.[11]

B. The Contentions of Respondents and the Courts Below

Three lines of argument have been advanced in support of respondents' opposite interpretation of § 7(o)(2)(A). At this juncture, we consider and rebut each one.

1. Respondents contend that the text of FLSA § 7(o)(2)(A) is so clear and unambiguous—and so in

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[11] We note that the Secretary's interpretation of § 7(o)(2)(A) was fully endorsed by eight of the Amendments Act's principal sponsors and conferees—from both parties and from both the House and the Senate—who filed a submission with the Secretary on this subject during the administrative comment period. This submission explained:

> It is the employees' designation, and not the employer's recognition or attitude toward that representative that is vital. FLSA Section 7(o)(2)(A)(i) was specifically drafted to avoid any requirement of formal recognition. During the consideration of the legislation, specific references were made to a number of states where NLRA collective bargaining style recognition does not exist, but where large numebrs of fire, police, and general public employees belong to labor organizations. We intended the FLSA requirement of an agreement on compensatory time to apply in those situations.
>
> Finally, we understand that some employers or employer representatives may have suggested that the final paragraph following the new FLSA Section 7(o)(2)(B) was intended to provide that the Section (A)(i) requirement of an agreement with the employee representative is not applicable to situations where a regular compensatory time practice was in effect on April 15, 1986. As is clear from the express language of that paragraph, the rule with regard to practices in effect on April 15, 1986, applies *only* to Section (A)(ii) situations in which no representative is involved.
>
> The current proposed regulations properly reflect the language and intent of the new law. [September 26, 1986 letter to Secretary Brock from Senators Metzenbaum, Kennedy, and Stafford, and Representatives Murphy, Hawkins, Jeffords, Clay, and Williams, *reprinted as* Appendix I, Pet. App. 156a-158a.]

favor of an absolute public employer "right" to impose compensatory time arrangements on its employees—as to preclude any need to refer to the Secretary's rule or any other external materials, and, indeed, so clear as to render the Secretary's contrary construction invalid. Brief in Opposition, at 8-10.

Under this view, the text of FLSA § 7(o)(2)(A) simply offers a public employer different forms of "agreements" through which the employer may—as it chooses—implement compensatory-time arrangements of its own formulation. Thus, under subclause (i), an employer may reach an understanding regarding compensatory time with its employees' representatives; *but*, under the first part of subclause (ii), an employer who chooses not to enter any such understanding may nevertheless offer its preferred arrangement to individual employees as a condition of employment; *and*, under the second part of subclause (ii), the employer may (regardless of the existence of any representative) treat any compensatory time policies that existed prior to the effective date of the Amendments Act as an agreement with each employee hired before that date. In essence, under this view, § 7(o)(2)(A) places no constraints at all on public employers, who are to be limited—within otherwise lawful options—only by labor market forces. This is not even a fair reading of the statutory words, much less the only reasonable reading.

First, the words of the provision itself can hardly be said to clearly convey respondents' interpretation. As the Tenth Circuit explained:

> We find the language of section 207(o) to be ambiguous. Subclause (ii) applies to "employees not covered by subclause (i)." However, given the wording of subclause (i), it is unclear whether this means employees who do not have a representative, or employees who are not subject to an agreement reached with a representative. [*Local 2203 v. West Adams Co. Fire Dist.*, 877 F.2d 814, 816-817 (1989); *see also id.* at 817 n.1.]

Thus, this language is certainly *not so clear and unambiguous* as to justify, by itself, the overturning of the relevant administrative construction.

Second, respondents' interpretation assumes that Congress chose an extremely complex and turgid formulation to state a very simple point. In essence, under respondents view, public employers who wish to follow a particular compensatory-time arrangement have an absolute legal right to do so. If this was its purpose, Congress could easily have stated, in simple and clear terms, that public employers could impose on their employees whatever otherwise valid compensatory time practice the employer preferred, subject to no restrictions under FLSA § 7(o)(2)(A) whatsoever.

Indeed, if this was Congress' purpose, it is not clear why the Legislature drafted and then enacted § 7(o)(2)(A). The remaining provisions of § 7(o), after all, would have the same operative legal effect—*viz.*, allowing employers unilateral discretion to adopt any otherwise lawful compensatory time arrangement—without any further need for a provision containing § 7(o)(2)(A)'s complex language. *See, e.g.*, 29 U.S.C. § 207(o)(1) (public employees may utilize compensatory time "in accordance with this subsection"). Certainly no distinction between different kinds of agreements would need to have been written into law, since nothing would rest on any such distinction. Thus, the very presence of § 7(o)(2)(A) in the statute—with its distinctions between subclause (i) agreements and subclause (ii) agreements—demonstrates that the broadly permissive policy urged by respondents simply is not the policy that Congress wrote into law.

Third, respondents' view of the statute is entirely incompatible with the statute's legislative history. As noted *supra* at pp. 14-15, the House Report unequivocally states that an employer may only utilize individual agreements under subclause (ii) with respect to employees who have *not* designated a representative:

> Where employees have selected a representative, which need not be a formal or recognized collective bargaining agent, as long as it is a representative designated by the employees, the agreement or understanding *must be* between the representative and the employer. . . . Where employees do not have a representative, the agreement or understanding must be between the employer and the individual employee. [H. Rep. 99-331, *supra* at 20 (emphasis added).]

The Senate Report as well, although differing with the House Report on some issues, agrees with the House Report in stating that, under § 7(o)(2)(A), employers may *not* utilize individual agreements under subclause (ii) if their employees have a representative. *See* S.Rep. 99-159, 99th Cong. 1st Sess. 10-11 (1985) ("Where employees have a recognized representative, the agrement or understanding *must be* between that representative and the employer. . . . Where employees do not have a recognized representative, the agreement or understanding must be between the employer and the individual employee." (emphasis added)).

Thus, *both* the House Report and the Senate Report are *wholly inconsistent* with respondents' position.[12]

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[12] The principal difference between the House Report language on FLSA § 7(o)(2)(A) and the Senate Report language is on the issue of *when* employees have a representative for purposes of subclause (i). The Senate Report refers to "recognized representative," implying that recognition by the employer is a prerequisite to coverage under subclause (i). S. Rep. 99-159, *supra*, at 10. The House Report expressly rejects this, stating that "a representative . . . need not be a formal or recognized collective bargaining agent, as long as it is a representative designated by the employees." H. Rep. 99-331, *supra*, at 20. Both reports were discussing substantially identical statutory language.

Although respondents have at various times urged that the Senate Report—and not the House Report—provides the correct interpretation of the relevant statutory language, neither the Senate bill, nor the final statute, refers to "recognized" representatives. Moreover, the Secretary of Labor, after a full rulemaking proceeding, concluded that the House Report more accurately captures the meaning of § 7(o)(2)(A), and that "recognition" of a representative by an employer is not a prerequisite to an employee's coverage under subclause (i). Respondents have made no showing as to why the Secretary's conclusion in this regard should be held unreasonable.

2. Respondents have also argued—and the court below agreed—that petitioners' construction of the statute does not take proper account of Texas law, which provides that collective bargaining agreements between public agencies and labor organizations representing public employees have no legal validity unless (in the special case of fire or police employees) the voters of the relevant political subdivision of the State have approved a collective bargaining statute for such employees in a referendum. *See* Tex. Rev. Civ. Stat. Ann., Art. 5154C (*cited at* Pet App. 4a-6a). In the same vein, respondents point out that under Texas law, absent such voter approval, a jurisdiction cannot recognize a union as a collective bargaining representative. *Id.* Since the voters of Harris County have not approved any such referendum, respondents and the court below would have it that these Texas law prohibitions remove petitioners and respondents from FLSA § 7(o)(2)(A)(i)'s coverage; place the parties under subclause (ii); and thus validate respondents' decision to adopt a compensatory time arrangement without any agreement or understanding whatsoever with petitioners' representative. *See, e.g.*, Pet. App. 6a ("because Texas law prohibits the County from entering into a collective bargaining agreement with the Union—and thus there

is no such agreement—the deputies are not covered by subclause (i)"). This argument too lacks merit.

a. Nothing in FLSA § 7(o)(2)(A) or its regulations limits the coverage of subclause (i) to employees covered by state laws that allow public employee collective bargaining agreements, collective bargaining recognition, or any other system of formal or binding public employee labor relations arrangements. Nor does that subclause even require formal collective bargaining arrangements, or any other formal or binding labor relations arrangement that would have any particular legal import under state law.

To the contrary, the statute clearly and carefully refers to arrangements that might be reached pursuant to a "*memorandum of understanding, or any other agreement,*" as well as pursuant to a "collective bargaining agreement." 29 U.S.C. § 207(o)(2)(A)(i) (emphasis added). And, the regulations make clear that "the representative need not be a formal or recognized bargaining agent as long as it is a representative designated by the employees." 29 C.F.R. § 553.23(b)(1). The statute and regulations, after all, are *not* concerned with whether any particular arrangement under subclause (i) is *enforceable as a contract under state law*, but only with whether the arrangement—as a matter of federal FLSA law—allows for a mutually agreeable accommodation between employer and employee on compensatory time-off in lieu of the normal statutory requirement of overtime pay.

As the regulations reflect, the statutory language recognizes that many states do prohibit formal collective bargaining agreements and official union recognition in their public sector labor relations systems. Yet, Congress also recognized that in fact public employees in those states are nevertheless frequently represented in their employment relations by labor organizations, that public employers have in fact treated with such labor organizations, and that the parties to such arrangements—whatever the status of the arrangements may be under state law—should be entitled to seek to reach equitable compensatory time agreements under the FLSA, just as other public employers, employees and labor organizations are privileged to do. *See e.g.*, House Hearings, *supra*, at 57, 59, 85, 142 & 157.

In this regard, the statutory language reflects a policy of according public employees a measure of added compensatory time flexibility but not an unlimited amount. While the FLSA generally prohibits the use of compensatory time, an exception was crafted that emphasizes the desirability of arrangements that are mutually acceptable to public employers and employees. By drafting the provision as it did, the Congress assured that the exception would be available when public employers and employees reach agreements, regardless of the varying public employee relations systems that exist among the states. The statute most assuredly does *not* reflect a policy such as that asserted by respondents: *viz.*, that a public employer in a state without formal collective bargaining may choose not to seek *any* kind of FLSA arrangement under subclause (i), but may nevertheless adopt a compensatory time arrangement of its own liking in lieu of the overtime pay that the FLSA normally requires.

It is not surprising that Congress recognized the prevalence of public employee representation arrangements outside of the context of formal or binding union recognition and collective bargaining. It has been well-documented that informal representation arrangements have been used for decades to attain understandings between public employees (represented by labor organizations) and their employers in states where collectively-bargained contracts are invalid and unenforceable under state law. *See, e.g., Nichols v. Bolding*, 277 So.2d 868 (Alabama, 1973) (despite prohibition on collective bargaining agreements, union and public agency could enter written, non-

binding "memorandum of understanding," which notes that administratively adopted personnel policy reflects consultation and agreement between the parties); *Walker Co. Board of Educ. v. Walker Co. Educ. Ass'n*, 431 So.2d 948, 954-55 (Alabama, 1983) (same); *Board of Educ. v. Scottsdale Educ. Ass'n*, 498 P.2d 578 (Ariz. App., 1972) (despite prohibition on collective bargaining agreements, public agency could negotiate model contract for union's 1200 members and enter contracts with those members, through their union, as long as members consented and contract only contained terms that could be included in individual contracts); *State Board of Regents v. United Packing House Workers*, 175 N.W.2d 110, 113 (Iowa, 1970) (despite prohibition on collective bargaining agreements, public agency may meet with representatives of employees' union, agree to negotiate terms, and adopt those terms in proper legislative manner); *see also* Georgia Op. Att'y. Gen. 75-457, *Legal Status of Public Employee Labor Organizations in Georgia*, at 463-465 (despite prohibition on collective bargaining agreements, public agency could "bargain collectively in the sense of meeting and consulting with union officials about wages, hours, and the conditions of employment of public employees").

Indeed, Texas itself illustrates this pattern. Although a Texas public employer may not enter collective bargaining agreements or officially recognize unions as collective bargaining representatives under state law, public employers may—and often do—enter a variety of less formal and less binding relationships with unions as representatives of their employees. *See generally* Morris, *Everything You Always Wanted to Know About Public Employee Bargaining in Texas—But Were Afraid to Ask*. 13 Houston L. Rev. 291 (1976).

Thus, Texas law explicitly recognizes the "right of public employees to present grievances concerning their

wages, hours of work, or conditions of work . . . through a representative that does not claim the right to strike." Tex. Rev. Civ. Stat. Ann., Art. 5154C(6). The Texas courts have interpreted this as providing public employees an "absolute right" to present their grievances through a union, *Corpus Christi Teachers v. Corpus Christi Indep. School Dist.*, 572 S.W.2d 663, 665 (Texas, 1978); *Sayer v. Mullins*, 681 S.W.2d 25 (Texas, 1984), and the right to act in concert, empowering their union to represent them collectively in bringing and settling group grievances. *Lubbock Professional Firefighters v. Lubbock*, 742 S.W.2d 413, 417-19 (Tex. Civ. App. 1987); *Dallas Indep. School Dist. v. AFSCME*, 330 S.W.2d 702 (Tex. Civ. App. 1959).

Given the wording of FLSA § 7(o)(2)(A)(i)—and given the backdrop of state public employment relations arrangements against which the statute was drafted—the contention that Texas' prohibition of collective bargaining somehow excludes the employees of Texas public employers from the coverage of that subclause has no merit.

3. In the same vein, respondents and the court below contend that in Texas, unlike some other states that prohibit collective bargaining, a public agency is not allowed to enter "any contracts" with a labor organization. *See* Brief in Opposition, at 5, 20 (*citing Beverely v. City of Dallas*, 292 S.W.2d 172 (Tex. Civ. App. 1956)); Pet. App. 7a ("Texas law prohibits any bilateral agreement between a city and a bargaining agent, whether the agreement is labeled a collective bargaining agreement or something else. Under Texas law, the county could not enter into *any* agreement with the Union.") Thus, respondents argue, it should not be assumed that Congress intended to make § 7(o)(2)(A)(i) enforceable against a public employer if it "would conflict with Texas law." Brief in Opposition, at 2.

This argument seriously misperceives the nature of FLSA § 7(o)(2)(A)(i) agreements as well as the relationship between FLSA § 7(o) and state law.

First, the basis for the contention by respondents and the court below that no "contracts" or "bilateral agreements" are permitted under Texas law between a labor organization, on behalf of employees, and a public employer rests on the notion that a public employer may not *bind itself* to an outside agent with respect to its employment policies.

> The presentation of a grievance [which a union is permitted to do] is in effect a unilateral procedure, whereas a contract or agreement resulting from collective bargaining must of necessity be a bilateral procedure culminating in a meeting of the minds involved *and binding the parties to the agreement.* [*Beverly v. City of Dallas*, 292 S.W. 2d 172, 176 (Tex. Civ. App. 1956) (emphasis added), *quoted in* Appellees Brief, Fifth Circuit No. 90-2833, at 8.]

But, in contrast to the law of contracts and the law of collective bargaining agreements, *nothing* in FLSA § 7(o)(2)(A)(i) requires agreements that *bind the parties in any way.* A public employer, after reaching such an agreement or understanding, may if it chooses, utilize compensatory time in lieu of overtime pay in conformity with the agreement—or may, if the employer chooses otherwise, reject the agreement at any time and provide overtime pay in conformity with basic FLSA rules. The FLSA, in other words, requires only that, if the public employer chooses not to follow the agreement or understanding, the employer—like any other employer—must instead follow the normal overtime requirements of the FLSA. Nothing in the FLSA grants the employees covered by any agreement any right to hold the employer to the agreement. Thus, § 7(o)(2)(A)(i) *binds no party to any agreement's terms.* While a state may, as a matter of its own law, deem a particular agreement or understanding to be binding, the issue of whether this is so is of no consequence under the FLSA.

For this reason, respondents and the court below err in their premise that an agreement or understanding under subclause (i) of FLSA § 7(o)(2)(A) would conflict with the Texas policy against a public agency binding itself in contract to a labor organization with respect to its labor practices.

Second, if, contrary to what we have just shown, respondents and the court below are right in their assertion that an agreement or understanding pursuant to subclause (i) would conflict with Texas law, the precise conclusion to be drawn therefrom is far from clear. Texas, of course, may formulate its own laws and policies within the bounds of constitutional authority. But if Texas were to prohibit its agencies and local governments from selecting one option otherwise available under a federal regulatory scheme, this would hardly free Texas agencies or local governments from the federal-law consequences of that state law prohibition.

The closest respondents come to offering some explanation as to the relevance of their (erroneous) assertion that a Texas employer could not lawfully enter any agreement under FLSA § 7(o)(2)(A)(i) is to quote the following sentence from the preamble that accompanied the Deparment of Labor's regulations:

> It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices. [52 Fed. Reg. at 2015, *quoted at* Brief in Opposition at 2, 10.]

Respondents attempt to extract from this isolated sentence the theory that subclause (i) is inapplicable where state law prohibits a public employer from reaching any understanding with a representative of the employer's

employees. But respondents misunderstand the import of the quoted sentence.

As the Department of Labor explained in issuing its final regulations, a number of public employers submitted comments during the notice and comment period urging the Labor Department to adopt the principle that respondents here champion. These commentators

> expressed concern with the statement in [proposed] § 553.23(b)(1), "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." Two commentors objected to this provision because they believed it would require a collective bargaining obligation between a public employer and its employees, when no such bargaining obligation currently exists under State or Federal law. . . . They believed that § 553.23(b)(1) should operate only where collective bargaining obligations are provided for by State law. [52 Fed. Reg. 2014.]

In promulgating its final regulations, the Department expressly *rejected* this position. Like the proposed regulations, the final regulations state that "the representative need not be a formal or recognized bargaining agent as long as the representative is designated by the employees." 29 C.F.R. § 553.23(b)(1). And in the accompanying preamble, after reciting the concerns voiced by these public employers, the Department stated:

> The Department believes that the proposed rule accurately reflects the statutory requirement that a CBA [collective bargaining agreement], memorandum of understanding or other agreement be reached between the public agency and the representative of the employees where the employees have designated a representative. Where the employees do not have a representative, the agreement must be between the employer and the individual employees. The Department recognizes that there is a wide variety of State law that may be pertinent in this area. It is the Department's intention that the question of whether employees have a representative for purposes of FLSA section 7(o) shall be determined in accordance with State or local law and practices.
>
> In addition, to clarify the fact that the representative of the employees need not be a formal or recognized collective bargaining agent, the Department has modified [proposed] § 553.23(c)(1), as suggested by the National Education Association (NEA) to add the words "or otherwise designated" between the words "recognized" and "representative" since collective bargaining is not a necessary condition for establishing an agreement between an employer and an employee representative. [52 Fed. Reg. 2014-15.]

Viewed in its full context, defendants' attempt to extract from the foregoing a limitation on subclause (i) which would exclude from its coverage any state which does not authorize—or which prohibits—any particular form of labor agreement between public employers and their employees could not be more wrong. Both the language of the regulation and the preamble itself squarely reject such a limitation and make clear that neither "recognition" nor "collective bargaining" is a "necessary condition" for the application of subclause (i); all that is necessary is that "the employees have designated a representative."

The Department's statement that "the question of whether employees have a representative . . . shall be determined in accordance with State or local law and practice." fairly read, simply explains that state law may be relevant in determining when employees "have designated a representative." Thus, when state law creates a method for employee designations of representatives—*e.g.*, through a collective bargaining system based on exclusive representation—that system will be sufficient under § 7(o), and § 7(o) will not be construed in a manner that dis-

rupts the state's designation process. But nothing in the preamble says—or even suggests—that where there is no state law rule on designation, employees cannot have a representative and § 7(o)(2)(a)(i) cannot apply. After all, the preamble's reference to state law falls immediately between two passages explaining that subclause (i) governs all employees who "have designated a representative," and this same point appears in the rule's final text.

In sum, defendants are wrong in contending that a state law prohibition on collective bargaining—or any other particular labor arrangement—would excuse a public employer from its obligation, under the Amendments Act, either to pay overtime compensation to represented employees or to reach an agreement with the employees' representative authorizing the use of compensatory time.

* * * *

Plaintiffs' position on the proper construction of the statute is simple: § 7(o)(2)(A)(i) governs all cases where an employee has designated a representative. It does not matter whether the representative would be prohibited, under state law, from engaging in full collective bargaining, from entering binding agreements, or from otherwise engaging in representation activities beyond the most informal arrangements. In all such cases, until some form of compensatory time agreement or understanding is reached between the representative and the employer—whether oral or written, whether binding as a contract or not—the employer is not relieved of the normal overtime pay requirements of 29 U.S.C. § 207(a).

CONCLUSION

On the basis of the foregoing, this Court should reverse the judgment below.

Respectfully submitted,

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